II. Unlawful Domestic Surveillance and the Decline of Civil Liberties Under the Administration of George W. Bush

A. Chronology: Democracy Without Checks and Balances

> *"I don't email, however. And there's a reason. I don't want you reading my personal stuff. There has got to be a certain sense of privacy. You know, you're entitled to how I make decisions. And you're entitled to ask questions, which I answer. I don't think you're entitled to be able to read my mail between my daughters and me."*
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> **-----April 14, 2005, President George W. Bush, responding to questions at an American Society of Newspaper Editors conference in Washington.**[1009]

In the days and weeks after the horrific attacks of September 11, members of both political parties recognized the need to insure that law enforcement had the tools and resources to respond to terrorist threats, while at the same time respecting our Nation's core constitutional principles. With that goal in mind Judiciary Committee Chairman F. James Sensenbrenner and Ranking Member John Conyers introduced legislation that would both enhance law enforcement while providing for necessary safeguards to protect civil liberties.[1010] Their legislation passed the usually contentious Judiciary Committee by a unanimous vote of 36-0 on October 3, 2001.[1011]

Unfortunately - and ominously - the Bush Administration reneged on the bipartisan compromise and chose to go its own route by substituting a 342-page Administration draft. The Administration's substitute was inserted in the middle of the night and brought to the House floor a few hours later on October 12 with no amendments permitted. Final legislation passed the House on October 23, in the midst of an anthrax scare while most Members and staff were locked out of their offices and in no position to read, let alone understand, the legislation.[1012]

Among the more controversial sections of the PATRIOT Act added or expanded by the Bush Administration were provisions concerning: (i) "sneak and peak" warrants lowering the standard for the FBI to enter an individual's home and take property without notification;[1013] (ii) business records permitting the FBI to obtain any record, including medical, and library and bookstore reading information, with recipients "gagged" from informing others they received the request;[1014] (iii) National Security Letters (NSL's), permitting the FBI to mandate that businesses (including Internet and telecommunications companies) turn over specific financial, telephone, internet and other consumer records with no judicial oversight or approval, with recipients again "gagged" from informing others they received the request;[1015] and (iv) material support, permitting immigrants to be deported for donating funds to groups they did not know had terrorist ties and by criminalizing vaguely defined aspects of "material support" for terrorism.[1016] (Eventually, the National Security Letter provision was

held to violate the First and Fourth Amendments by two separate courts,[1017] while, the material support provisions were held to violate both the First Amendment right to freedom of speech and advocacy and the Fifth Amendment right to due process.[1018])

The enactment of the PATRIOT Act was followed by a series of unilateral actions taken by the Bush Administration that raised significant civil liberties and constitutional issues. For example, in the fall of 2001, the Administration elected to close many deporatation proceedings to the public, a practice, the Sixth Circuit held violated the First Amendment, by "seeking to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."[1019] Also, in late 2001, the Justice Department indefinitely detained more than 1,200 individuals in the U.S., the vast majority of Arab or Muslim descent.[1020] In addition, during this period we learned of additional instances of the Bush Administration choosing to conduct law enforcement activities based on race and ethnicity with regard to immigration registration, "voluntary" interrogations of Middle Eastern men, and other federal police activities.[1021] On November 13, 2001, the Administration announced the creation of secret military tribunals, again without any authorization or even input from Congress. The initial order was not limited to persons detained abroad or engaged in terrorism, but could apply to millions of immigrants who were in our nation lawfully.[1022]

On May 30, 2002, then Attorney General Ashcroft unilaterally announced that the Department had made major revisions to the guidelines that governed how it conducted investigations, removing a number of safeguards that had been included in the guidelines adopted by Attorney General Edward H. Levi in the wake of the Watergate and COINTELPRO surveillance scandals.[1023] Concerning the new guidelines, conservative columnist William Safire wrote that the Administration "gutted guidelines put in place a generation ago to prevent the abuse of police power by the federal government."[1024] This in turn, contributed to a series of instances in which the Bush Administration began investigating innocent Americans for engaging in constitutionally protected activities, such as protesting the war and protecting the environment.[1025] By late fall of 2002, reports began to circulate concerning the misuse and abuse of the material witness laws, with the principal targets again being individuals of Arab and Muslim descent.[1026]

In February, 2003, the Administration began circulating its so-called "PATRIOT II" legislation. This bill would have, among other things, authorized secret arrests, permitted the construction of detailed government databases based on information concerning innocent Americans, allowed the secret revocation of citizenship, and expanded the government's ability to search homes and tap phones without a warrant.[1027]

Throughout this period and his entire presidency, George W. Bush has unilaterally claimed the authority to disregard hundreds of laws duly passed by Congress. The *Boston Globe* reported that as of April, 2006, President Bush has

"claimed the authority to disobey more than 750 laws enacted since he took office asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.[1028] Among the laws Mr. Bush asserts he can ignore are torture bans, provisions requiring reports to Congress regarding the implementation of the PATRIOT Act, laws against using illegally obtained evidence, whistle-blower protections, and affirmative action requirements.[1029] Reacting to this unprecedented use of signing statements to ignore laws passed by Congress, Phillip Cooper, a legal expert on executive power stated, "there is no question that this administration has been involved in a very carefully thought-out, systematic process of expanding presidential power at the expense of other branches of government."[1030]

There is no better illustration of the full-blown constitutional crisis inherent in these unilateral actions taken by the Bush Administration than the series of circumstances concerning both the warrantless wiretapping of Americans by the Bush Administration and their creation of a database comprised of the calls of millions of innocent citizens (the focus of this Part of the Report). The National Security Agency's (NSA) warrantless wiretapping activities were initially disclosed on December 16, 2005, by *The New York Times*.[1031] This disclosure raised an obvious conflict with both the Foreign Intelligence Surveillance Act (FISA), which applies to the "interception of international wire communications *to or from any person (whether or not a U.S. person) within the United States* without the consent of at least one party"[1032] and the Fourth Amendment.[1033] Government sources have stated that pursuant to this program "the NSA eavesdrops without warrants on up to 500 people in the United States at any given time."[1034] *The Washington Post* has reported that "[t]wo knowledgeable sources placed that number in the thousands, one of them, more specific, said about 5,000."[1035]

Attorney General Gonzales has asserted that pursuant to the program, the NSA intercepts the contents of communications where there is a "reasonable basis to believe" that a party to the communication is "a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda or working in support of al Qaeda."[1036] General Hayden, the Principal Deputy Director for National Intelligence, has stated that the judgment of whether to target a communication is made by operational personnel at the NSA using the information available to them at the time,[1037] and that judgment is made by two people, signed off only by a shift supervisor.[1038]

In early 2004, Jack Goldsmith, the head of the DOJ Office of Legal Counsel raised concerns with James Comey, the Deputy Attorney General, about the legality of the program.[1039] Mr. Comey was acting as Attorney General while John Ashcroft was in the hospital. Mr. Comey reportedly agreed with Mr. Goldsmith that the program raised serious legal and constitutional concerns and refused to reauthorize it. As a result, Andrew Card, then White House chief of staff, and Albert Gonzales, then-White House Counsel, visited Mr. Ashcroft in the hospital in a further unsuccessful effort to persuade him to reverse his deputy.[1040] These refusals reportedly led to the

temporary shut down of the program and eventually the creation of a secret audit of the program examining several cases to determine how the NSA was running the program and to review the parameters for determining reasonable belief. Thereafter, DOJ and NSA are reported to have developed a checklist to follow in determining whether "reasonable belief" existed.[1041]

The Administration and the Department of Justice also encountered resistance from the FISA court. Judge Colleen Kollar-Kotelly complained that information obtained under the program was being improperly used as the basis for FISA wiretap warrant requests.[1042] Judge Royce Lamberth, the U.S. District Court judge who preceded Kollar-Kotelly as the head of the FISA court, also raised doubts regarding the program. According to government sources, "[b]oth judges expressed concern to senior officials that the president's program, if ever made public and challenged in court, ran a significant risk of being declared unconstitutional . . . . Yet the judges believed they did not have the authority to rule on the president's power to order the eavesdropping . . . and focused instead on protecting the integrity of the FISA process."[1043] As a result, in early 2002 the FISA court and DOJ reportedly reached a compromise, by which in any case involving warrantless surveillance where the government subsequently sought an official FISA warrant was to be "tagged" as such, and that a FISA warrant would only be sought based on independently gathered information presented to the presiding judge.[1044] However, by 2004, James Baker, DOJ's liaison to the FISA court, was forced to acknowledge to the court that NSA was not providing DOJ with the information needed to implement the tagging system, and as a result, Judge Kollar-Kotelly complained to Attorney General Ashcroft, which also reportedly helped lead to the program's suspension.[1045] Eventually, the Department agreed that a high-level official would certify that the information provided to the FISA court was accurate, or face possible perjury charges.[1046] Once the program was disclosed to the public, another judge on the court, James Robertson, became so concerned about the program's legality he resigned his position in protest.[1047]

After initially attempting to downplay the significance of disclosure of the domestic spying program, the Bush Administration realized it had a major controversy on its hands and crafted a full-scale legal and public relations offensive. The Department of Justice was called upon to issue an ever-expanding set of after-the-fact legal rationales - on December 22, 2005, they wrote a four- page letter to the House and Senate Intelligence Committees;[1048] on January 19, 2006 they issued a 42-page "White Paper;"[1049] and on January 27, 2006, the Department issued a 27-point "Myth vs. Fact" memorandum.[1050]

The domestic spying program has engendered widespread opposition, including from a number of Republicans, conservatives, and non-partisan groups. Those who have raised questions or challenged the legal and constitutional underpinnings of the NSA program include: Senate Judiciary Chairman Arlen Specter (R-PA), Senators Chuck Hagel (R-NE), Olympia Snowe (R-ME), Richard Lugar (R-IN), Susan Collins (R-ME), John Sununu (R-NH), Larry Craig (R-ID), Lindsey Graham (R-SC), and John McCain (R-AZ); former GOP Congressman Bob Barr; conservative activists Grover Norquist,

David Keene, and Paul Weyrich; former Republican officials such as Judge and former Reagan FBI Director William Sessions, former Reagan Associate Deputy Attorney General Bruce Fein and former Nixon White House Counsel John Dean; conservative legal scholars such as CATO's Robert Levy and University of Chicago Professor Richard Epstein, noted conservative columnists William Safire, George Will, and Steve Chapman; the American Bar Association, the Congressional Research Service, and numerous current and former members of the Bush Administration. Among other things, Senator Specter stated that the Administration's legal interpretation "just defies logic and plain English,"[1051] and David S. Kris, the former Associate Deputy Attorney General at the Department of Justice for national security, issued a 23-page legal analysis finding that the Administration's arguments were "weak" and unlikely to be supported by the courts.[1052]

It has also been reported that senior members of the Bush Administration specifically sought and obtained information from the NSA concerning the identity of American citizens who were swept up in the warrantless surveillance program. *Newsweek* reported the "NSA received - and fulfilled - between 3,000 and 3,500 requests from other agencies to supply the names of U.S. citizens and officials ...that initially were deleted from raw intercept reports... .About one third of such disclosures were made to officials at the policymaking level."[1053] One case involved John Bolton, the then Under Secretary of State for Arms Control, who stated at his April, 2005 confirmation hearing for U.N. Ambassador that in the last four years he had obtained from the NSA the names of American citizens on numerous occasions, in apparent violation of NSA rules requiring the blacking out of such names when intelligence reports are distributed. [1054]

On May 11, 2006, another aspect of the domestic spying scandal erupted. *USA Today* reported that according to individuals with first-hand knowledge, "[t]he NSA has been secretly collecting the phone call records of tens of millions of Americans."[1055] The newspaper reported that "[t]he NSA program reaches into homes and businesses across the nation by amassing information about the calls of ordinary Americans - most of whom aren't suspected of any crime."[1056] According to individuals familiar with the program, "[i]t's the largest database ever assembled in the world," and the NSA's goal is "to create a call of every call ever made" in the U.S.[1057] The NSA database program was reportedly developed in the fall of 2001, with the cooperation of three telecommunications companies - AT&T, Verizon, and BellSouth - under the direction of then NSA Director General Michael Hayden.[1058] Under the program the various telephone numbers as well as the time and destination of the calls, known as "call detail records" are turned over to the NSA. While the program apparently does not include specific names or addresses,[1059] there is little doubt the government can ascertain this information through access to commercial databases and other sources.[1060]

The basic contours of the NSA domestic database program have been confirmed - either directly or indirectly - by a number of sources beyond those relied on by *USA Today* in their May 11 article. First and foremost, is the fact that Qwest has provided

a specific statement that they rejected the NSA's request in the fall of 2001.[1061] Second, although neither the President nor his staff would officially confirm or deny the domestic database story, *The New York Times* reported on May 12 that "[o]ne senior government official who was granted anonymity to speak publicly about the classified program confirmed that the N.S.A. had access to records to most telephone calls in the U.S."[1062] Similarly, *Time Magazine* reported that a White House official confirmed the existence of the program when he told them the program was "just digits ... just a bunch of numbers."[1063] Government sources have also confirmed the existence of the NSA database program to Seymour Hersch of *The New Yorker*.[1064] Two Republican Senators on the Intelligence Committee have indirectly confirmed the existence of the program: Senator Trent Lott (R-MS) informed Bloomberg News that he had been briefed on the database program,[1065] while Senator Kit Bond (R-MO) told PBS that "I'm a member of the subcommittee on the Intelligence Committee that's been thoroughly briefed on this [the NSA database] program."[1066] The allegations were taken so seriously by the Bush Administration, that they even threatened prosecution of the press for the disclosure.[1067]

About one week after the *USA Today* story broke, both BellSouth and Verizon sought to distance themselves from the NSA program in somewhat qualified terms.[1068] However, as *The New York Times* noted, "the statement by Verizon left open the possibility that MCI, the long-distance carrier it bought in January, did turn over such records - or that the unit, once absorbed into Verizon, had continued to do so."[1069] With respect to the BellSouth denial, *The Washington Post* noted "BellSouth did not address whether it might have provided such records outside of a contract or to an agency other than the NSA."[1070] Skepticism regarding these denials were further fueled by a report in *Business Week* that some companies are willing to serve as intermediaries between telephone companies and the government,[1071] and the disclosure of a May 5 presidential memorandum permitting the NSA to authorize corporations to conceal activities concerning national security without violating the securities laws.[1072]

A number of prominent conservatives and Republicans have also expressed reservations about the NSA data base program. Former GOP Speaker Newt Gingrich declared, "I'm not gong to defend the indefensible."[1073] Senator Charles Grassley (R-IA) asked "why are the telephone companies not protecting their customers" privacy,"[1074] and House Majority Leader John Boehner stated, "... I'm not sure why it would be necessary to keep and have that kind of information."[1075]

Beyond this series of disturbing events in the U.S., a number of reports also surfaced describing abuses of liberties and rights abroad. In addition to the many reports of abuses reported at Guantanamo Bay,[1076] the Supreme Court has found the Administration's treatment of detainees to be violation of due process;[1077] while other courts have questioned the Bush Administration's actions in detaining Jose Padilla in military custody for several years, without trial, lawyer, charges, or access to the outside world.[1078] There is also significant evidence that the Administration has engaged in "extraordinary rendition," the process by which detainees are sent to

nations which engage in torture[1079] and it has been reported that the Administration has set up a network of secret CIA prisons in Eastern Europe and other locations where individuals may be detained free of congressional or human rights oversight.[1080] There is little evidence these actions have produced actionable intelligence.[1081]

B. Detailed Findings

1. Domestic Surveillance: Spying On Innocent Americans without Court Approval and Outside of the Law

> *"If the lickspittle lawyer [defending the program] thinks all this is legal, 'he's smoking Dutch Cleanser.'"*
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> **-----February 7, 2006, Senate Judiciary Chairman Arlen Specter, during an interview with *The Washington Post*.[1082]**

As a result of our review, we have been able to make a number of preliminary findings and determinations based on the facts we are aware of. First, we have found that the warrantless wiretapping program is clearly unlawful, that the massive domestic database created by the NSA also appears to violate several statutes, and that the limited Congressional briefings surrounding these programs contravened the National Security Act. Just as dangerously, the legal justifications used by the Administration to justify the warrantless wiretap program could establish a legal precedent which provides for no meaningful limitation on executive branch authority. Third, in attempting to justify the programs, President Bush and other members of the Bush Administration appear to have made a number of misleading statements. Also, we have found that while there is little evidence that the programs have been beneficial in the war against terror, there is however a considerable risk they will affirmatively harm terrorism prosecutions. Finally, the NSA programs appear to have been implemented in a manner designed to stifle legitimate concerns within the Administration.

a. The warrantless wiretap program violates FISA and the Fourth Amendment, the NSA database program appears to violate the Stored Communications Act and the Communications Act of 1934, and the programs have been briefed in violation of the National Security Act

The Bush Administration has laid out a number of arguments to defend the warrantless wiretapping program disclosed by *The New York Times* in December: first they claim that the program does not violate FISA because the September 11 Use of Force Resolution authorized the surveillance program; second, they argue that the program falls within the President's inherent authority as Commander-in-Chief; and third they claim that the Fourth Amendment warrant requirement does not apply to the programs. The Bush Administration has not directly sought to specifically defend the NSA database program, but that program appears to be unlawful as well. They also offer a number of non-legal justifications for the programs; namely that the FISA

procedures are too cumbersome; the NSA programs could have prevented the 9/11 attacks; and that both President Carter and Clinton have engaged in warrantless surveillance. Our review - and the review of the overwhelming majority of outside and independent experts - has found that these arguments are neither credible nor legally sustainable.

i. September 11 Use of Force Resolution

The Bush Administration has put forth four separate legal justifications for the proposition that the so-called Authorization for the Use of Military Force (AUMF)[1083] authorizes warrantless wiretapping within the United States. First, the Administration highlights a provision in the AUMF preamble that reads, [the attacks of September 11th] "render it both necessary and appropriate that the United States exercise its right to self-defense and to protect United States citizens both at home and abroad."[1084] Second, the Administration relies on a 2004 Supreme Court decision, *Hamdi v. Rumsfeld,*[1085] in which in upholding the Non-Detention Act the Court noted that the AUMF "clearly and unmistakably authorize[s]" the "fundamental incident[s] of waging war."[1086] Third, the Administration points to a provision of FISA which "makes it unlawful to conduct electronic surveillance, 'except as authorized by statute'"[1087] and argues that the AUMF provides such explicit statutory authority.[1088] Fourth, the Administration argues that the canon of constitutional avoidance requires resolving conflicts between FISA's proscriptions and executive branch authority in favor of the President.[1089]

Our review indicates that the overwhelming weight of legal authority contravenes each and every one of these assertions. First, with regard to the claims that the AUMF resolution directly authorized warrantless wiretapping or other surveillance in the U.S., Tom Daschle, the Senate Majority Leader at the time the AUMF was enacted, has stated the Senate rejected a last minute request from the White House that the AUMF authorize "all necessary and appropriate force in the United States and against those nations, organizations or persons [the President] determines planned, authorized, committed or aided" the attacks of Sept. 11th.[1090] **Senator Daschle explains that "this last-minute change would have given the president broad authority to exercise expansive powers not just overseas - where we all understood he wanted authority to act - but right here in the United States, potentially against American citizens."**[1091]

Republican Senator Sam Brownback (R-KS) has concurred with Senator Daschle, stating, "I do not agree with the legal basis on which [the Administration] are basing their surveillance - that when the Congress gave the authorization to go to war that gives sufficient legal basis for the surveillance."[1092] Senate Judiciary Chairman Arlen Specter (R-PA) has stated that "I do not think that any fair, realistic reading of the September 14 resolution gives you the power to conduct electronic surveillance,"[1093] while Senator Lindsey Graham (R-SC) declared, "I will be the first to say when I voted for it, I never envisioned that I was giving to this President or any other President the ability to go around FISA carte blanche."[1094] Senator John McCain (R-AZ) has stated,

"I think it's probably clear we didn't know we were voting for [domestic warrantless surveillance]."[1095] Significantly, in a 44-page memorandum, the nonpartisan Congressional Research Service has concluded that based on their review of the law, "it appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations here under discussion."[1096]

Moreover, it is difficult for the Administration to credibly claim that the AUMF authorizes warrantless wiretapping, when they have also acknowledged that Congress was not supportive of such a proposal.[1097] **On December 19, 2005, Attorney General Gonzales stated that "[w]e have had discussions with Congress in the past [after the September 11 attacks] - certain members of Congress - as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that would be difficult, if not impossible."**[1098] As conservative columnist George Will has written, "Administration supporters incoherently argue that the AUMF authorized NSA surveillance - and that if the Administration had asked, Congress would have refused to authorize it."[1099] The Administration's tepid response in this area - they have admitted they never even bothered to inquire about the possibility of amending FISA with Members on the Judiciary Committee which has jurisdiction over FISA[1100] - may in part be due to the fact that this argument was apparently developed well after the fact.[1101] It is also imformative that efforts to further modify FISA were either dropped because they were too controvarisal (such as the PATRIOT II proposal)[1102] or shot down by the Administration itself (such as the a proposal by Senator DeWine to require only reasonable suspicion for FISA warrants).[1103]

Second, the Administration's contention that the *Hamdi* decision supports the proposition that the AUMF authorizes the President to engage in warrantless wiretapping is contradicted by the fact that the majority of the Court found that Mr. Hamdi has a right to due process and that the U.S. was not permitted to detain him for an indefinite period of time, writing, "indefinite detention for the purpose of interrogation [of enemy combatants] ... is not authorized."[1104] In addition, the *Hamdi* decision itself is limited to operations abroad and to enemy combatants of the United States.[1105] By contrast, the domestic wiretapping program applies in the U.S. to U.S. persons who have not been shown to have done anything harmful to the U.S. As constitutional expert Professor Laurence Tribe notes, it is therefore difficult to argue that *Hamdi* supports the idea of warrantless surveillance of Americans, when they "are not even *alleged* to be enemies, much less *enemy combatants*."[1106]

Third, in its White Paper, the Administration goes to great pains to claim that FISA contemplated exceptions to it, and that those who dispute their interpretations are somehow arguing that one Congress can bind a future Congress.[1107] Clearly, one Congress cannot bind a future Congress, however that is not in dispute. The problem for the Bush Administration is that when Congress enacted FISA in 1978, it went to great lengths to state that FISA was the exclusive authority concerning electronic surveillance, that the only exceptions to that law were some "technical activities," such as so-called "trap and trace" monitoring, and that it was intended that any

future exemptions should be clear and specific, not vague and general as is the case with the Administration's AUMF assertion. As the House Committee explained in legislative history, FISA "carries forward the criminal provisions of chapter 119 [of Title 18, U.S.C.] and makes it a criminal offense for officers or employees of the United States to intentionally engage in electronic surveillance under color of law except as specifically authorized in chapter 119 of title III [of the Omnibus Crime Control and Safe Streets Act of 1968] and this title [concerning pen register activities]."[1108] In reviewing this legislative history, the Congressional Research Service observed, "the legislative history appears to reflect an intention that the phrase "authorized by statute" was a reference to chapter 119 of Title 18 of the U.S. Code (Title III) and to FISA itself, rather than having a broader meaning, in which case a clear indication of Congress's intent to amend or repeal it might be necessary before a court would interpret a later statute as superceding it."[1109]

Thus, while FISA certainly is subject to amendment, it is clear that the AUMF does not come close to meeting the standards of precision contemplated by Congress.[1110] In the present case, not only did the AUMF not explicitly amend FISA as Congress intended, it is not even clear the AUMF constitutes a "statute" within the meaning of FISA. As Professor Turley explained in the House Democratic Hearing, "the Force Resolution is not a statute for the purpose of Section 1809 [of FISA]."[1111]

The Department's fourth assertion -- that the cannon of constitutional avoidance should lead to an implicit statutory repeal of FISA -- is also not legally sustainable. The case law holds such repeals by implication can be established only by "overwhelming evidence" - which is clearly not the case with regard to the NSA domestic wiretapping program. A 2001 Supreme Court decision held that "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable;"[1112] while another 2001 Supreme Court case found that "the canon of constitutional avoidance has no applications in the absence of statutory ambiguity."[1113] The interpretational rule which does apply in the present case is the doctrine that specific statutes prevail over general statutes when there is a possible conflict.[1114] Accordingly, as Judge Sessions and other legal scholars explained, "[c]onstruing FISA and the AUMF according to their plain meanings raises no serious constitutional questions regarding the President's duties under Article II . . .[c]onstruing the AUMF to permit unchecked warrantless wiretapping without probable cause, however, would raise serious questions under the Fourth Amendment."[1115]

ii. Inherent Authority as Commander-In-Chief

As an alternative to its statutory authority argument, the Administration also claims it has authority to conduct domestic warrantless wiretapping by virtue of the President's "inherent" constitutional authority as Commander-in-Chief.[1116] The Bush Administration has developed three rationales to support this claim. First, the Administration asserts the founding fathers intended that the executive branch be "cloathed with all the powers requisite" to protect the Nation,[1117] and compares the

current executive surveillance program to the intelligence methods of President George Washington, who intercepted mail between Britain and Americans in the revolutionary war; President Woodrow Wilson, who in WWI intercepted cable communication between the U.S. and Europe; and President Franklin Roosevelt, who intercepted mail after the bombing of Pearl Harbor.[1118] Second, the Administration relies on Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer,*[1119] to argue that the President's wartime authority to act is at it's "zenith" with respect to warrantless surveillance."[1120] Third, the Administration repeatedly cites a passage in the *In re Sealed Case* that "[w]e take for granted that the President does have [inherent wiretap authority] and, assuming that it is so, FISA could not encroach on the President's constitutional power,"[1121] which case in turn refers to three earlier circuit court decisions.[1122]

The Administration's contention that the intent of the founding fathers supports their inherent authority argument belies any viable understanding of the founding of the United States. It was Benjamin Franklin who declared, "[t]hey that can give up essential liberty to purchase a little temporary safety, deserve neither liberty not safety,"[1123] and it was James Madison who warned that wartime is "the true nurse of executive aggrandizement."[1124] A close review of Federalist 23 reveals that it argues for a strong federal government, not a strong executive.[1125] **Moreover, in Federalist 47, Madison further warned about the dangers of excess of power in the executive, writing, "[t]here can be no liberty where the legislative and executive powers are united in the same person," or "if the power of judging be not separated from the legislative and executive powers."**[1126] If the Administration truly appreciated history, they would recognize that the founding fathers provided for a Fourth Amendment with a strong warrant requirement in reaction to the colonists well-founded fears regarding the British "general warrant" of the 1700s, under which the British authority, "could break into any shop or place suspected of containing evidence of potential enemies of the state."[1127]

The argument that warrantless surveillance has been going on since as early as General George Washington does not appear to be legally or constitutionally credible. Not only did some of the "precedents" cited by the Administration occur before the Constitution, Bill of Rights, or Fourth Amendment was in place, but the cited actions by President Woodrow Wilson and Franklin Roosevelt occurred before the Supreme Court held in 1967 that the Fourth Amendment applies to electronic surveillance,[1128] before FISA was enacted in 1978, and before Congress repealed a provision of law deferring to the President with respect to foreign intelligence information.[1129]

The Administration's argument that the *Youngstown Steel* decision supports the claim of inherent authority is also legally tenuous. The holding of *Youngstown Steel* rejected the idea that President Truman had inherent presidential authority to seize steel mills during the Korean military conflict, with the Supreme Court finding that such important questions as the authority to seize private property "is a job for the Nation's lawmakers, not for its military authorities."[1130] Properly understood, the *Youngstown Steel* case severely undermines, rather than supports the

Administration's position. In his critical concurring opinion, Justice Jackson explained that "the presidential powers are not fixed, but fluctuate, depending upon their disjunction or conjunction with those of Congress,"[1131] and that when the President defies "the expressed or implied will of Congress," his authority is "at its lowest ebb" and "Presidential power [is] most vulnerable to attack and in the least favorable of possible constitutional postures."[1132]

In the present case, there appears to be little doubt that the warrantless wiretapping program disclosed by *The New York Times* is operating against the express as well as the implied will of Congress, and that the President is therefore at his "lowest ebb" in terms of constitutional authority. The legislative history of FISA makes it abundantly clear that Congress intended to and indeed did "express its will" and "occupy the field" with respect to the area of surveillance impacting Americans.[1133] Thus, when Congress approved FISA in 1978, it refused to provide an exception to enable the President to conduct warrantless surveillance involving Americans[1134] and, as noted above, explicitly repealed the provision which the executive branch had previously relied upon in claiming inherent presidential authority for warrantless surveillance. [1135]

The legislative history from the House, Senate, and Conference Report all supports this understanding. **The House Report provides, "[e]ven if the President has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, *Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the exclusive means by which such surveillance may be conducted.*"**[1136] The Senate Judiciary Committee was also clear on this point, finding FISA "constitutes the exclusive means by which electronic surveillance ... may be conducted."[1137]

The Conference report - the final and most definitive explanation of Congress's legislative intent - firmly reiterates that **Congress intended to occupy the field regarding domestic warrantless surveillance: *"The intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure case: 'When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter.'"***[1138]

Although the Bush Administration attempts to assert that contemporaneous statements of the Carter Administration indicate their support for warrantless surveillance,[1139] the legislative history is also quite clear that at the time of its passage, the executive branch understood and accepted that the FISA law would occupy the field. Testifying before the House Intelligence Committee in 1978, Attorney General Griffin Bell stated, "I would particularly call your attention to the improvements in this bill over a similar measure introduced in the last Congress. First, *the current bill recognizes no inherent power of the President to conduct*

electronic surveillance. Whereas the bill introduced last year contained an explicit reservation of Presidential power for electronic surveillance within the United States, this bill specifically states that the procedures in the bill are the exclusive means by which electronic surveillance, as defined in the bill, and the interception of domestic wire and oral communications may be conducted."[1140]

The Bush Administration's reliance on language in *In re Sealed Case* and the three court of appeals decisions noted therein is not persuasive for several reasons. The actual statement in the *In Re Sealed Case* is *dicta* - the issue before the FISA court was whether the new "significant purpose" test for FISA warrants enacted pursuant to the PATRIOT Act complied with the Fourth Amendment, not whether warrantless domestic surveillance was constitutional.[1141] Also, all three court of appeals decisions cited by the Administration were decided prior to the enactment of the 1978 FISA law and are easily distinguishable [1142] After reviewing these cases, the non-partisan Congressional Research Service concluded, "[i]n the wake of FISA's passage, the Court of Review's reliance [in the *In re Sealed Case*] on these pre-FISA cases or cases dealing with pre-FISA surveillance as a basis for its assumption of the continued vitality of the President's inherent authority to authorize the warrantless electronic surveillance for the purpose of gathering foreign intelligence information might be viewed as somewhat undercutting the persuasive force of the Court of Review's statement."[1143]

iii. Fourth Amendment

Even if the Administration is able to establish that warrantless domestic wiretapping was statutorily or otherwise legally authorized - which does not appear to be the case - in order to be lawful it must also be shown to comply with the Fourth Amendment's warrant requirement (which has been definitively held to apply to electronic surveillance[1144]). For its part, the Bush Administration argues that the NSA program should be considered reasonable, both under a general "balancing of interests" test under the Fourth Amendment[1145] and pursuant to a "special needs" exception to the Fourth Amendment set forth in various court decisions.[1146]

The Administration's contention that the domestic wiretapping program complies with the Fourth Amendment fails for several reasons. First, the cases cited by the Justice Department can be easily distinguished, and are either pre-FISA or include mitigating factors that are not present in the Bush Administration's warrantless surveillance program.[1147] As the letter signed by former FBI Director Sessions, Professor Van Alstyne and other scholars and officials explained:

> the NSA spying program has *none* of the safeguards found critical to upholding "special needs" searches in other contexts. It consists not of a minimally intrusive brief stop on a highway or urine test, but of the wiretapping of private telephone and email communications. It is not standardized, but subject to discretionary targeting under a standard and process that remain secret. Those whose privacy is intruded upon have no notice or choice to opt

out of the surveillance. And it is neither limited to the environment of a school nor analogous to a brief stop for a few seconds at a highway checkpoint. Finally, and most importantly, the fact that FISA has been used successfully for almost thirty years demonstrates that a warrant and probably cause regime is *not* impracticable for foreign intelligence surveillance.[1148]

Second, the essential test set forth by the Bush Administration for conducting warrantless wiretapping- an NSA determination that there is a "reasonable basis to believe" that a party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda or working in support of al Qaeda." - is inconsistent with the Fourth Amendment's probable cause requirement. Although the Attorney General has attempted to argue that "it's the same standard,"[1149] George Washington Law School Professor Jeffrey Rosen has observed, "[I]t's not the same standard: Probable cause is clearly more demanding."[1150] Another legal expert, President Bush's Chief of the FBI's national security law unit, Michael J. Woods, explained that this lower legal threshold may be the reason the Administration decided to opt out of FISA to begin with.[1151]

Third, and in any event, it does not appear that the surveillance being performed under the NSA program can meet even the Administration's lower self-imposed "reasonable basis" standard, which would need to be applied by a court and not the Administration. According to government sources, and as noted at greater length below, the NSA program had little discernible impact on the government's ability to prevent terrorist plots by Al Qaeda.[1152] It has been reported by official sources that fewer than ten U.S. persons per year have aroused sufficient suspicion during warrantless surveillance to warrant seeking a full fledged FISA warrant. [1153] Accordingly, both national security lawyers working for and outside the Bush Administration have stated that this low "washout" rate make it doubtful the program could be deemed "reasonable" and pass muster under the Fourth Amendment.[1154]

A government lawyer who has closely examined the NSA wiretapping program has stated that the minimum conceivable definition of "reasonable basis" would require that evidence derived from the eavesdropping would be "right for one out of every two guys at least."[1155] This individual stated that the individuals who developed the program "knew they could never meet that standard - that's why they didn't go through" the FISA court.[1156] Michael J. Woods has reiterated that even the Administration's own "reasonable basis" standard would necessitate, as a constitutional matter, evidence "that would lead a prudent, appropriately experienced person" to believe the American was a terrorist agent, and if the program returned "a large number of false positives, I would have to conclude that the factor is not a sufficiently reliable indicator and thus would carry less (or no) weight.[1157]

iv. NSA Domestic Database Program

Our review indicates that creating a massive NSA database program first disclosed by *USA Today* has also resulted in apparent legal violations. These include ongoing civil violations of the Stored Communications Act and the Communications Act, and potentially criminal violations as well.[1158] The Stored Communications Act of 1986[1159] (SCA) prohibits the knowing disclosure of customer telephone records to the government unless pursuant to subpoena, warrant[1160] or a National Security Letter (or other Administrative subpoena);[1161] with the customer's "lawful consent;"[1162] there is a business necessity;[1163] or there is an emergency involving danger of death or serious physical injury.[1164] None of these exceptions apply to the circumstances described in the *USA Today* story.

Qwest has already stated that with regard to the subpoena or warrant, "no such authority had been granted." As the program is being run through the NSA, not the FBI, no NSL's would have been issued to obtain the data.[1165] There is also no colorable argument of business necessity; if anything, releasing the records was deleterious to the phone companies' business. With regard to customer consent,[1166] this would not seem applicable under the present circumstances because the provision is analogous to the consent exception of the closely related Federal Wiretap Act,[1167] requiring that "the user actually agreed to the action, either explicitly or implicitly based on the user's decision to proceed in light of actual notice, and there is no indication such opt-in notice was provided."[1168] As for the "emergency" exception, there is no indication either the post-2006 ("the provider, in good faith, believes that an emergency involving danger or death, or serious physical injury to any person"), or pre-2006 (the provider "reasonably believed that there was an immediate danger of death or physical injury") statutory language was in any way intended by Congress to exempt wholesale requests by the NSA for entire databases on an ongoing basis. Moreover, given that the NSA database program has been operating continuously for nearly five years - through a range of color-coded threats - it would seem to be an impossible task to claim for the government to claim that at all times and in all regions there was an "immediate danger" to life.[1169]

Section 222 of the Communications Act[1170] prohibits the disclosure of telephone customer information to any third party except as required by law;[1171] with the approval of the customer;[1172] or for other specific business exigencies.[1173] Again, none of these exceptions apply in the present situation. There has been no court approved warrant or subpoena issued and none of the identified business exigencies apply. With respect to the customer consent argument, this would again require affirmative opt-in by millions of customers, as required by the analogous Federal Wiretap Act, as well as the applicable regulations.[1174]

The NSA would have separately violated the criminal law if it obtained the customer information on a "real time" basis, through so-called "trap and trace" or "pen register" mechanisms. This is a concern given that a former intelligence official has stated, "[t]his is not about getting a cardboard box of monthly phone bills in alphabetical order. The N.S.A. is getting real time and actionable intelligence."[1175] The Pen Register and Trap and Trace Statute (18 U.S.C. Sec. 3121) prohibits the

installation of any pen register or trap and trace device without first obtaining a court order under FISA or under the general criminal wiretap law.[1176] Again, in the present circumstances there is no indication that a request for a warrant was made by the Justice Department under either FISA or the criminal wiretap laws. As a result, both the Center for Democracy and Technology (CDT) and the Center for National Security Studies have concluded that the Administration's actions were likely unlawful. CDT wrote, "[i]f the program involved real-time interception, it probably violated both the Foreign Intelligence Surveillance Act and the statute on interception of call detail information in criminal cases."[1177] Kate Martin, the Director of the Center wrote "[i]f the NSA used a pen register or trap and trace device in real time, it was required to obtain an order from the FISA court, either under the specific pen register provisions .... or under the provisions for electronic surveillance generally."[1178]

Finally, although the Supreme Court held in 1979 in *Smith v. Maryland*[1179] by a 5-4 vote that the use of a pen register recording numbers from a specific phone is not considered a "search" for Fourth Amendment purposes, there are some indications that the decision may not have continued viability given changes in technology over the years. As Professor Tribe wrote of the 1979 decision, "[u]convincing then, those words ring hollow today, now that information technology has made feasible the NSA program whose cover was blow [in May]. That program profiles virtually every American's phone conversations, giving government instant access to detailed knowledge of the numbers, and thus indirectly the identities, of whomever we phone; when and for how long; and what other calls the person phoned has made or received. As Justice Stewart recognized in 1979, a list of numbers called 'easily could reveal ... the most intimate details of a person's life."[1180] If Professor Tribe is correct, the NSA database program would also constitute a violation of the Fourth Amendment as well as the above referenced statutory prohibitions.

v. Additional Non-Legal Justifications

The Bush Administration has also propounded a number of non-legal justifications for the NSA surveillance programs. First, they have argued that it is impractical and cumbersome for the Administration to comply with FISA, which they assert needs to be "modernized."[1181] Second, Vice President Cheney, General Hayden and others have asserted that had warrantless domestic spying programs been in place in the early part of 2001, they would have been able to prevent the September 11 attacks - by intercepting the communications involving two of the 9/11 hijackers (Nawaf Alhazmi and Khalid Almidhar);[1182] or their co-conspirator Zacarias Moussaoui.[1183] Third, members of the Bush Administration,[1184] the Republican National Committee[1185] and their allies have asserted that Presidents Jimmy Carter and Bill Clinton authorized comparable forms of surveillance programs during their administrations through Executive Orders and Project Echelon.

The Bush Administration's contention that FISA is too "cumbersome and burdensome"[1186] and has not been "modernized" is belied by the fact that FISA clearly permits the Attorney General to conduct emergency surveillance so long as they

obtain court approval within three days.[1187] The Bush Administration has never adequately explained why this three-day retroactivity requirement was not appropriate for their needs, other than to say that processing FISA applications requires significant manpower and resources.[1188] However, we are not aware of any request by the Administration to obtain the necessary personnel or resources to allow them to comply with the law.

FISA itself has been updated on numerous occasions to respond to concerns regarding its "agility." Soon after the September 11 attacks, Congress amended FISA to extend its emergency exemption from 24 to 72 hours.[1189] The PATRIOT Act included some twenty-five separate updates to FISA[1190] including: (i) expanding the scope of FISA pen register authority;[1191] (ii) lowering the standard for FISA pen-traps;[1192] (iii) lowering the legal standard for FISA surveillance;[1193] (v) extending the duration of FISA warrants;[1194] (vi) expanding the scope of business records that can be sought with a FISA order;[1195] (vii) allowing for "John Doe" roving wiretaps;[1196] (vii) requiring the intelligence community to set FISA requirements and assist with dissemination of FISA Information;[1197] (ix) immunizing those complying with FISA orders;[1198] (x) lowering the standard for National Security Letters;[1199] and (xi) expanding NSL approval authorities.[1200] Subsequent to the passage of the PATRIOT Act, Congress has again at the Administration's request broadened FISA to allow surveillance of "Lone Wolf" terrorists.[1201]

Moreover, *The Washington Post* has reported that **"[s]everal FISA judges said they ... remain puzzled by Bush's assertion that the court was not 'agile' or 'nimble' enough to help catch terrorists. The court had routinely approved emergency wiretaps 72 hours after they had begun, as FISA allows, and the court's actions in the days after the Sept. 11 attacks suggested that its judges were hardly unsympathetic to the needs of their nation at war."**[1202] Indeed, the ease of use of both the standard warrant and the emergency provisions is illustrated by the fact that between 1979 and 2004 the FISA court approved 18,748 warrants and rejected only five applications,[1203] while from 2001- April 1, 2003, DOJ had successfully employed the emergency FISA provisions 170 times - nearly four times as much as it has been used by all previous administrations combined.[1204]

In addition, the FISA court has specifically acceded to adopting new procedures to streamline the FISA warrant process. On September 12, 2001, one day after the attacks, when FBI Director Robert Mueller and other Justice officials asked then-FISA presiding judge Lamberth to allow for expedited FISA procedures, he immediately agreeded. According to an informed government official: "The requirement for detailed paperwork was greatly eased, allowing the NSA to begin eavesdropping the next day on anyone suspected of a link to al Qaeda, every person who had ever been a member or supporter of militant Islamic groups, and everyone ever linked to a terrorist watch list in the United States or abroad."[1205] **Even former Secretary of State Colin Powell acknowledged, that it would not have been "that hard" for the Bush Administration to obtain warrants to comply with FISA requirements.**[1206]

The Administration's claims that the NSA programs could have prevented the September 11 attacks also do not appear to comport with the facts. With respect to Nawaf Alhazmi and Khalid Almihdhar, the September 11th Commission found the government had already compiled significant information on these individuals prior to the attacks, writing, "[o]n May 15, [2001], [a CIA official] reexamined many of the old cables from early 2000, including the information that Mihdhar had a U.S. visa, and that Hazmi had come to Los Angeles on January 15, 2000. The CIA official who reviewed the cables took no action regarding them."[1207] Under FISA, the Administration could have used the information to seek permission to monitor the suspects' phone calls and e-mails without risking any disclosure of the classified information. It is also not at all clear that warrantless surveillance would have been useful in averting the 9/11 attacks, since the Administration was unable to locate where the two suspects were living in the United States and, according to the FBI "had missed numerous opportunities to track them down in the 20 months before the attacks."[1208] **Senator Bob Kerry, who was a member of the 9/11 Commission, specifically criticized General Hayden for suggesting that the NSA warrantless wiretapping program could have prevented the September 11 attack stating: "[t]hat's patently fales and an indication that he's willing to politicize intelligence and use false information to help the President."[1209]**

As for the Administration's claims regarding Zacarias Moussaoui, a 2003 Senate Judiciary Committee Report found that the evidence gathered against him would have met the standard for acquiring a FISA warrant, and that FBI personnel "failed miserably" in its attempts to secure approval for a warrant.[1210] More recently, FBI Agent Harry Samit, who had interrogated Mr. Moussaoui before the September 11 attacks, testified he had warned his superiors more than 70 times, and as recently as September 10, 2001, that he believed that Moussaoui was a terrorist involved in a plot to hijack an airplane, but the warnings were ignored by the FBI's Bin Laden unit.[1211] It also has been reported that the FBI ignored warnings it received from Phoenix FBI Agent Kenneth Williams, that he had uncovered a scheme by al Qaeda to send terrorists to the U.S. to obtain flight training.[1212]

Third, it is not factually correct to assert that either Presidents Carter or Clinton authorized surveillance comparable to President Bush's NSA programs. In attempting to divert attention from President Bush's conduct, the Republican National Committee asserted that both Presidents Carter and Clinton had authorized comparable forms of "search [or] surveillance without court orders."[1213] However, the RNC misstated the impact of a Clinton Executive Order; EO 12949 merely clarified the existing FISA authority for warrantless surveillance in emergency situations.[1214] The RNC left out the requirement, included in the same sentence of the Executive Order, that any warrantless search not involve "the premises, information, material or property of a United States person."[1215] The Carter Executive Order 12139, also only permitted warrantless surveillance on "foreigners who are not protected by the Constitution."[1216]

With regard to the argument that under President Clinton Project Echelon was comparable to the Bush Administration's domestic database program, that program was premised on court-approved warrants. Thus, then CIA Director George Tenet, in his April 12, 2002 testimony before the Senate Intelligence Committee stated that Project Echelon utilized the warrant process: "We do not target [the phone calls of U.S. residents] for collection in the United States unless a FISA warrant has been obtained from the FISA Court by the Justice Department."[1217]

vi. Intelligence Briefings In Violation of the National Security Act

Members of the Bush Administration have repeatedly pointed to the value and significance of their briefing certain members of House and Senate Leadership and the Chairs and Ranking Members of the House and Senate Intelligence Committees regarding the domestic spying programs.[1218] The NSA briefings concerning both the warrantless wiretap and domestic database programs were conducted by the Administration as so-called "Gang of Eight" briefings - which included the Speaker and Minority Leader of the House, the Majority and Minority Leaders of the Senate, and the Chairmen and Ranking Members of the Congressional Intelligence Committees.[1219]

Briefings of this nature would appear to be in violation of the National Security Act of 1947,[1220] which governs the manner in which Members of Congress are to be briefed on intelligence activities. The law requires the President to keep all Members of the House and Senate Intelligence Committees "fully and currently informed" of intelligence activities.[1221] Only in the case of a highly classified covert action (when the U.S. engages in operations to influence political, economic or military conditions of another country) does a statute expressly permit the President to limit briefings to a select group of Members.[1222] Covert actions, pursuant to the statute, do not include "activities the primary purpose of which is to acquire intelligence."[1223] The Act makes clear that the requirement to keep the committees informed may not be evaded on the grounds that "providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information."[1224] (Eventually, on May 12, 2006, the White House relented and permitted full briefings of the House and Senate Intelligence Committees, but this appeared to simply be an effort to ease Gerald Hayden's confirmation hearings before the Senate Intelligence Committee scheduled for the next day.[1225])

In the report, "Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions" the Congressional Research Service concludes that "[b]ased upon publicly reported descriptions of the program, the NSA surveillance program would appear to fall more closely under the definition of an intelligence collection program, rather than qualify as a covert action program as defined by statute."[1226] Under this characterization, **according to Congressional Research Service, "limiting congressional notification of the NSA program to the Gang of Eight . . . would appear to be inconsistent with the law."**[1227]

It is also disingenuous for members of the Bush Administration to assert that the briefings themselves somehow gave the warrantless or domestic database programs enhanced legitimacy or legality,[1228] as those Members who were briefed were constrained from taking actions to preempt the program. Suzanne Spaulding, former legal counsel for both Republican and Democratic leaders on the House and Senate Intelligence Committees explained the inherent limitations of the "gang of eight" briefings: "They are provided only to the leadership of the House and Senate and of the intelligence committees, with no staff present. The eight are prohibited from saying anything about the briefing to anyone, including other intelligence panel members. The leaders for whom I worked never discussed the content of these briefings with me. It is virtually impossible for individual members of Congress, particularly members of the minority party, to take any effective action if they have concerns about what they have heard in one of these briefings. It is not realistic to expect them, working alone, to sort through complex legal issues, conduct the kind of factual investigation required for true oversight and develop an appropriate legislative response."[1229] Intelligence Committee Ranking Democrat Jane Harmann agreed, writing "Gang of Eight briefings do not provide for effective oversight. Members of the Gang of Eight cannot take notes, seek the advice of counsel, or even discuss the issues raised with their committee colleagues."[1230]

b. The legal justifications used to justify the NSA programs threaten to establish a constitutionally destabilizing precedent

> *"To borrow from Justice Robert Jackson's dissent in Korematsu v. United States (1944), the chilling danger created by President Bush's claim of wartime omnipotence to justify the NSA's eavesdropping is that the precedent will lie around like a loaded weapon ready for the hand of the incumbent or any successor who would reduce Congress to an ink blot."*
>
> **-----January 26, 2006, former Reagan Associate Deputy Attorney General Bruce Fein, testifying at House Democratic Hearings on NSA wiretap scandal.[1231]**

One of the most problematic aspects of the domestic wiretapping program is the after the fact legal rationales developed by the Justice Department to justify the program to the public. By articulating far-fetched and extravagant legal justifications, the Bush Administration has compounded the initial problem by asserting a legal precedent without any meaningful limitation on executive authority, and which sends a signal that the president considers himself to be above the law.

As *Barron's Magazine* Associate Editor Thomas G. Donlan wrote, the existence of the NSA wiretapping program "was worrisome on its face, but in justifying their actions, officials have made a bad situation much worse: Administration lawyers and the president himself have tortured the Constitution and extracted a suspension of the separation of powers."[1232] Similarly, Jonathan Schell noted that "if [the president] can suspend FISA at this whim and in secret, then what law can he not

suspend? What need is there, for example, to pass or not pass the Patriot Act if any or all of its provisions can be secretly exceeded by the President? [and] If abuses of power are kept secret, there is still the possibility that, when exposed, they will be stopped. But if they are exposed, and still permitted to continue, then every remedy has failed, and the abuse is permanently ratified. In this case what will be ratified is a presidency that has risen above the law."[1233] In a similar vein, **during the Senate Judiciary Committee hearings, Republican Senator Lindsey Graham told the Attorney General, "[r]eally, Mr. Attorney General, you could use the inherent authority argument of a Commander-in-Chief at a time of war to almost wipe out anything Congress wanted to do."[1234]**

The Administration's response to this concern has been somewhat inconsistent and contradictory. When asked about the limits of executive power during an interview on January 31, 2006 on CBS News, the President responded that he believed his power had limits even in wartime: "I don't think a president can order torture, for example. I don't think a president can order the assassination of a leader of another country with which we're not at war ... There are clear red lines."[1235] However, the president has not articulated where these "clear red lines" are derived from, if not the types of statutory and constitutional limitations that were ignored in connection with the warrantless surveillance program itself. Moreover, Attorney General Gonzales has contradicted the president's statements about what those limitations may be. When Senator Graham asked if it was lawful for the Congress to tell the executive that he cannot physically abuse a prisoner of war, he stated, "I am not prepared to say that Senator. I think that is- I think you can make an argument that is part of the rule the Government ... ."[1236] In addition, the President's assertions of limitations are undermined by his own signing statement that he was not bound by the recently enacted congressional limitations on torture.[1237]

Many observers have seen through the Administration's arguments, and found real danger in the breadth and brazenness of their legal contentions. *New York Times* columnist Bob Herbert has explained that by operating independently of the courts, the Bush Administration is jeopardizing the principal of "separation of powers, which is the absolutely crucial cornerstone of our form of government - our bulwark against tyranny. An elaborate system of checks and balances (you need a warrant from a court to wiretap, for example) prevents the concentration of too much power in any one branch, or any one person. Get rid of the checks and balances and you've gotten rid of the United States as we know it."[1238] Others recognized that by legally justifying warrantless surveillance, the Administration was using the very same arguments it had wrongfully used to justify torture and other unchecked abuses of executive power. *The Washington Post* warned, "[t]his [legal] interpretation [of domestic spying], with its expansive view of the commander in chief's powers, would call into question Congress's ability to prevent the administration from engaging in torture or cruel and inhuman treatment or to establish rules for detainees and military tribunals . . . ."[1239]

Web commentator Glen Greenwald has observed that the same dangerous and limitless legal argument appeared in the now infamous "Bybee Memo" justifying torture in contravention of applicable international treaties and legal structures. Just as in the case of domestic spying, the Bybee Memo contended, "it must be admitted, as a necessary consequence that there can be *no limitation* of that authority, which is to provide for the defense and safety of the community, *in any matter essential to its efficacy* . . . . The Constitution's sweeping grant vests in the President an *unenumerated* Executive power . . . The Commander in Chief Power and the President's obligation to protect the Nation *imply the ancillary powers necessary to their successful exercise.*"[1240] *U.S. News & World Report* recently reported that soon after the September 11, 2001 terror attacks, lawyers in the White House and the Justice Department argued that the same legal authority that allowed warrantless electronic surveillance inside the U.S., could also be used to justify physical searches of terror suspects homes and businesses without court approval.[1241]

Fears that the legally expansive rationales behind the warrantless wiretapping program would be used to justify other unilateral actions which may impinge on our citizens' civil liberties have been validated during the limited hearings held by the Senate and House Judiciary Committees. At the Senate Judiciary hearing on February 6, 2006, Attorney General Gonzales refused to respond to Senator Schumer's question as to whether the Administration had entered the homes of any American citizens without warrants.[1242] Morever, subsequent to the hearing, the Attorney General wrote an ominous letter, creating the impression that there were indeed additional top secret programs using such authority outside of the domestic spying program. The *Washington Post* wrote, "Attorney General Alberto R. Gonzales appeared to suggest yesterday that the Bush administration's warrantless domestic surveillance operations may extend beyond the outlines that the president acknowledged in mid-December."[1243]

Other examples of the dangerous nature of the legal precedent set by the warrantless surveillance program can be illustrated by the response to questions submitted by Members of the House Judiciary Committee. Among other things, the Department of Justice made clear that even if Congress passed legislation restricting the domestic warrantless wiretapping program and the president signed it and agreed to it, the president was subsequently free to ignore these restrictions under the inherent authority argument.[1244] **Of particular concern, at the House Judiciary hearings, the Attorney General essentially admitted that under the inherent authority argument, the Administration would also have the legal authority to intercept purely domestic communications between American citizens without a court approved warrant. In response to a question from Rep. Adam Schiff (D-CA), Mr. Gonzales stated, "I'm not going to rule it out."**[1245]

c. President Bush and other high ranking members of the Bush Administration appear to have made a number of misleading statements concerning the NSA programs

"Now, by the way, any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so . . . constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution."

-----April 20, 2004, President George W. Bush, Buffalo, NY, in a speech discussing the enactment of the USA Patriot Act.[1246]

As part of the efforts to justify the NSA surveillance programs, it appears that President Bush and members of his Administration made a number of inaccurate statements. These include statements to the effect that domestic wiretapping was being done according to court approved warrants, indicating that no purely domestic communications were intercepted, that the government was not monitoring U.S. calls on a widespread basis, and mischaracterizing the extent and nature of concerns raised by Members during the course of classified briefings.

i. Statements that the government was only intercepting communications involving American citizens pursuant to court approved warrants.

Separate and apart from the question of the legality of the warrantless wiretapping program, it appears that Members of the Bush Administration misled Members of Congress and the American people when discussing this issue before the December, 2005 *New York Times* disclosure of the program. The public record reveals that on numerous occasions prior to this disclosure, President Bush and others in his Administration indicated that wiretapping of Americans would only occur pursuant to a court order:

- On September 10, 2002, then Associate Attorney General David Kris testified before the Senate Judiciary Committee that "both before and after the PATRIOT Act, FISA can be used only against foreign powers and their agents, and only when there is at least a significant foreign intelligence purpose for the surveillance. Let me repeat for emphasis, we cannot monitor anyone today whom we could not have monitored at this time last year."[1247]

- On April 19, 2004, President Bush stated, "law enforcement uses so-called roving wiretaps to investigate organized crime. You see, what that meant is if you got a wiretap by court order -- and, by the way, everything you hear about requires court order, requires there to be permission from a FISA court, for example."[1248]

- On April 20, 2004, President Bush stated: "Now, by the way, any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so . . .

constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution."[1249]

- On July 14, 2004, the President stated, "[f]irst of all, any action that takes place by law enforcement requires a court order. In other words, the government can't move on wiretaps or roving wiretaps without getting a court order."[1250]

- On January 6, 2005, in response to Senator Feingold asking "does the President, in your opinion, have the authority, acting as Commander in Chief, to authorize warrantless searches of American's homes and wiretaps of their conversations in violation of the criminal and foreign intelligence surveillance statutes of this country," Mr. Gonzalez responded, "it's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes."[1251] When Senator Feingold followed up by asking if Mr. Gonzales would "commit to notify Congress if the President makes this type of decision and not wait two years until a memo is leaked about it," he replied, "I will commit to advise the Congress as soon as I reasonably can, yes, sir."[1252]

- On June 9, 2005, President Bush stated, "Law enforcement officers need a federal judge's permission to wiretap a foreign terrorists phone, a federal judge's permission to track his calls, or a federal judge's permission to search his property."[1253] Similarly, on July 20, 2005, President Bush stated: "Law enforcement officers need a federal judge's permission to wiretap a foreign terrorist's phone, or to track his calls, or to search his property."[1254]

These statements do not comport with the Administration's responsibility to be careful and forthright in their statements to the Congress or the American people. The principal defense offered by President Bush is that "I was talking about roving wiretaps, I believe, involving the PATRIOT Act. This is different from the NSA program."[1255] This defense is incomplete at best, and misleading at worst.

First, the blanket defense does not apply to the many misleading statements made by members of the Bush Administration. Thus, on September 10, 2002, when Associate Attorney Kris stated, "we cannot monitor anyone today whom we could not have monitored at this time last year," this would seem false by any construction. The context of the statement indicates that with our without the PATRIOT Act, checks and balances - in the form of court-approved surveillance - are in place. It is also clearly misleading, when in January 2005, Attorney General Gonzales, who was integrally involved in the creation of the domestic spying program, told Senator Feingold that warrantless surveillance was not occurring, and pledged to let him know if such a program was initiated (which he never did). The Attorney General's response was in no way limited to PATRIOT Act authorities.

With regard to the President's statements, while they were made in speeches during which the PATRIOT Act was discussed, it is not at all clear that the President was intending to limit his remarks - which did not include specific qualifications - to

the PATRIOT Act. Read in context it would seem the more reasonable interpretation of the statements is as part of an overall effort to convince the public that the Justice Department was not over reaching in their investigations. This construction is supported by the fact that most investigations involve a variety of authorities, some under the PATRIOT Act, and some under other authorities. For example, the so-called "roving wiretaps" referred to by the president in his defense exist under both the PATRIOT Act and general criminal law.[1256]

ii. Statements that no purely domestic communications were intercepted under the warrantless wiretapping program

On numerous occasions, members of the Bush Administration have asserted that the NSA warrantless wiretapping program does not include purely domestic communications. For example, on January 25, 2006, President Bush stated, the NSA program was limited to international calls, stating, "[i]n other words, one end of the communication must be outside the United States."[1257] On December 19, 2005, Attorney General Gonzales indicated that "[t]he President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the - one party to the communication is outside the United States."[1258] On January 19, 2006, Vice President Cheney stated that the surveillance program consists of "international communications, one end of which [the NSA] have reason to believe is related to al Qaeda or to terrorist networks affiliated with al Qaeda."[1259] Furthermore, on January 23, 2006, General Hayden said that "[o]ne end of any call targeted under this program is always outside the United States."[1260]

These statements do not appear to be accurate. Government sources and other media reports indicate that purely domestic communications have been intercepted in connection with the warrantless wiretapping program, and that this occurs by virtue of the program accidently capturing domestic to domestic cell phone and other communications and by intentionally capturing communications by Americans as part of an expanding chain of intercepts which may have began abroad.

First, government officials have specifically indicated that the eavesdropping program "has captured what are purely domestic communications."[1261] According to Robert Morris, a former senior scientist at the NSA, it is "difficult, even for the NSA, to determine whether someone is inside or outside the United States when making a cell phone call or sending an email message."[1262] As a result, telecommunications experts believed that the "people [the NSA] may think are outside the United States are actually on American soil."[1263] Government officials, confirming that there are accidental intercepts of purely domestic calls, revealed that there have been instances of "someone using an international cell phone [being] thought to be outside the United States when in fact both people in the conversation were in the country."[1264]

That there is little question that purely domestic communications have been at least inadvertently captured can be seen by the fact that at Judiciary Committee hearings, the Justice Department indicated that such communications are destroyed when they are identified.[1265] It is also telling that the Administration has not responded to charges that the program may have specifically targeted American citizens. For example, NBC implied in an interview with James Risen information that CNN's chief international correspondent, Christiane Amanpour, was targeted by the NSA domestic surveillance program.[1266] In the interview, Andrea Mitchell asked Mr. Risen, "You don't have any information, for instance, that a very prominent journalist, Christiane Amanpour, might have been eavesdropped upon?" The transcript from the interview was posted on the MSNBC.com website, but NBC later redacted the portion of the transcript concerning the line of questioning on the wiretapping of Amanpour.[1267] Mr. Conyers and 27 other Members asked President Bush to respond to this charge, in a letter dated January 5, 2006,[1268] however, we have never received a response to this letter.[1269]

Second, there is evidence the NSA warrantless wiretapping program includes purely domestic communications by individuals located in the U.S. who have been linked to foreign parties. Officials familiar with the warrantless surveillance program indicated that initially the NSA program was intended to exploit computers, cell phones, and personal directories of al Qaeda operatives that had been seized by the CIA overseas.[1270] However, in addition to eavesdropping on data retrieved from the seized items, according to the government officials, the "NSA began monitoring others linked to them, creating an expanding chain."[1271] Although most of the numbers and addresses were overseas, according to officials, "hundreds [of the telephone numbers and email addresses] were in the United States."[1272] According to *The New York Times*, "In addition to eavesdropping on those numbers and reading e-mail messages to and from the Qaeda figures, the N.S.A. began monitoring others linked to them, creating an expanding chain. While most of the numbers and addresses were overseas, hundreds were in the United States, the officials said."[1273]

The *Washington Times* confirmed the nature of this ever expanding chain pulling in domestic to domestic communications based on their discussions with law enforcement officials:

> The [law enforcement] sources provided guidelines to how the administration has employed the surveillance program. They said the National Security Agency in cooperation with the FBI was allowed to monitor the telephone calls and e-mails of any American believed to be in contact with a person abroad suspected of being linked to al Qaeda or other terrorist groups. ***At that point the sources said, all of the communications of that American would be monitored, including calls made to others in the United States. The regulations under the administration's surveillance program do not require any court order.***[1274]

Current and former government officials as well as private sector sources have confirmed the basic outlines on the program, and its impact on purely American communications. On February 5, 2006, *The Washington Post* wrote:

> The program has touched many ... Americans... . Surveillance takes place in several stages, officials said, the earliest by machine. Computer-controlled systems collect and sift basic information about hundreds of thousands of faxes, e-mails and telephone calls into and out of the United States before selecting the ones for scrutiny by human eyes and ears. Successive stages of filtering grow more intrusive as artificial intelligence systems rank voice and data traffic in order of likeliest interest to human analysts. But intelligence officers, who test the computer judgements by listening initially to brief fragments of conversation "wash out" most of the leads within days or weeks."[1275]

In the May 29 issue of the *New Yorker*, Seymour Hersh confirmed that the Bush Administration was using this technique known as "chaining" to eavesdrop on domestic calls without a warrant:

> The N.S.A. also programmed computers to map the connections between telephone numbers in the United States and suspected numbers abroad, focusing on a geographic area, rather than on a specific person B for example, a region of Pakistan. Such calls often triggered a process known as "chaining' in which subsequent calls to and from the American number were monitored and linked ... . The N.S. A. began, in some cases, to eavesdrop on callers (often using computers to listen for key words) ... . A government consultant told me that tens of thousands of American had their calls monitored in one way or another. "In the old days, you needed probable cause to listen in. But you could not listen in to generate probable cause."[1276]

iii. Statements that the government is not monitoring telephone calls and other communications within the U.S.

The President and other members of the Bush Administration have also made a number of statements to the effect that the Administration was not monitoring calls or other domestic communications. For example, on December 27, 2005, White House spokesman Trent Duffy stated that the NSA program was "a limited program. This is not about monitoring phone calls designed to arrange Little League practice or what to bring to a potluck dinner."[1277] On May 8, 2006, when Intelligence Director John Negroponte declared the Bush Administration was "absolutely not" monitoring domestic calls without warrants and added, "I wouldn't call it domestic spying."[1278] On the day of the *USA Today* disclosure of the domestic database scandal, President Bush said, "[t]he privacy of ordinary Americans is fiercely protected in all our activities. We're not mining or trolling through the personal lives of millions of innocent Americans."[1279]

In light of the *USA Today* disclosure it was incomplete at best, and misleading at worst for Mr. Duffy and Mr. Negroponte to state that U.S. calls were not being monitored, given that, as the article makes clear "[t]he NSA has been secretly collecting the phone call records of tens of millions of Americans" and the "NSA program reaches into homes and businesses across the nation by amassing information about the calls of ordinary Americans - most of whom aren't suspected of any crime."[1280]

President Bush's statement that his Administration is not "mining or trolling through the personal lives of millions of Americans" also appears difficult to defend in light of the *USA Today* story. Even beyond the article's disclosure of the existence of the NSA database program, there is ample evidence the Bush Administration monitors the domestic communications of innocent Americans and maintain data bases of numerous aspects of our personal lives. Consider the following revelations which were disclosed independently of the May 11 *USA Today* article:

- In October 2002, then Senate Intelligence Chairman Bob Graham stated that "briefers told him in Cheney's office ... that Bush had authorized the [NSA] to tap into [domestic telephone] junctions .... and allowed the NSA to intercept, 'conversations ... that went through a transit facility inside the United States.'"[1281]

- In October 2002, NSA Director General Michael Hayden testified, "I have met personally with prominent corporate executive officers. (One senior executive confided that the data management needs we outlined to him were larger than any he had previously seen). [...] And last week we cemented a deal with another corporate giant to jointly develop a system to mine data ... ."[1282]

- In November 2002, *The New York Times* reported that the Pentagon was developing a tracking system called Total Information Awareness (TIA) which would have been capable of searching countless public and private databases and combining the information to find patterns and associations, peering into the lives of 300 million Americans.[1283] Although Congress eliminated funding for the controversial project in September 2003,[1284] TIA has been replaced by a number of programs, including: (i) the NSA's "Advanced Research and Development Activity" (ARDA)(the *National Journal* reported that research under TIA was moved to ARDA);[1285] (ii) the Pentagon's "Threat and Local Observation Notice" (TALON) Program[1286] (a memo obtained by *Newsweek* shows that the deputy Defense secretary admitted that TALON reports likely contain information on innocent U.S. citizens and groups);[1287] (iii) the Department of Homeland Security's "Analysis, Dissemination, Visualization, Insight, and Semantic Enhancement" (ADVISE) Program (designed to assemble a database by linking information from blogs, e-mail and government records);[1288] and (iv) the Pentagon's Counter Intelligence Field Activity (CIFA) (which was found to have "failed to follow policies regarding the collection and retention of information about U.S. persons").[1289] In May 2004, the GAO issued a report confirming that the Bush Administration was engaged in

"199 data mining efforts ... [of which] 122 used personal information."[1290] According to the GAO, the data mining included personal information from private and government sources.[1291]

- On December 23, 2005, *The New York Times* reported that according to government officials, "the NSA has gained the cooperation of American telecommunications companies to obtain backdoor access to streams of domestic and international communications"[1292] and the leading telecommunication companies "have been storing information on calling patterns and giving it to the federal government ... ."[1293] The *Times* further reported that according to a telecommunications industry source, "efforts to obtain call details go back to early 2001, predating the 9/11 attacks" and the "the NSA approached U.S. carriers and asked for their cooperation in a 'data-mining operation, which might eventually cull 'millions' of individual calls and e-mails."[1294]

- On January 20, 2006, Congressman Conyers sent letters to twenty companies - including telephone companies, cable companies, and internet service providers concerning their involvement in data mining and surveillance of American citizens.[1295] While several companies said that they would not support government surveillance except pursuant to a compulsory order,[1296] the responses of AT&T and Verizon appear to have been drafted to leave open the possibility that they had provided access and information without a court order or subpoena.[1297]

- On January 31, 2006, the Electronic Frontier Foundation filed a lawsuit alleging that AT&T gave the NSA access to massive databases of telephone and email messages. The lawsuit was supported by affidavits filed by Mark Klein who stated that in 2003 the NSA set up a "secret room" at AT&T's San Francisco and other West Coast offices capable of sweeping in telephone and Internet communications.[1298]

iv. Statements that Members of Congress briefed by the Bush Administration had not questioned the legality or appropriateness of the NSA Programs.

Members of the Bush Administration have claimed that during the various Congressional briefings, members of Congress did not raise any objections regarding the programs.[1299] For example, White House Counselor Dan Bartlett declared, that lawmakers who have been briefed on the NSA wiretapping program "believed we are doing the right thing," and that if Democrats "briefed on these programs would be screaming from the mountaintops," if they thought the program was illegal.[1300] With respect to the NSA domestic database program, White House Deputy Press Secretary Dana Perino stated that "all appropriate Members of Congress had been briefed."[1301] We have found, however, that numerous Members who were briefed about the spying programs did express concerns regarding both the scope of the briefing and the substance of the programs.

For example, **in 2003, the Ranking Democrat on the Senate Intelligence Committee, Senator Rockefeller (D-WV) handwrote a letter to Vice President Cheney expressing serious reservations about NSA warrantless wiretapping operations, noting "[c]learly, the activities we discussed raise profound oversight issues"[1302] and that "[w]ithout more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received."**[1303] Nancy Pelosi (D-CA) stated that when she was the Ranking Member of the House Intelligence Committee, she forwarded a letter to the National Security Agency in October 2001 indicating that because of President Bush's "overly broad interpretation" of the terms "'classified or sensitive law enforcement information,' it has not been possible to get answers to my questions,"[1304] and that "[u]ntil I understand better the legal analysis regarding the sufficiency of the authority which underlies your decision on the appropriate way to proceed on this matter, I will continue to be concerned."[1305] Bob Graham, the former Chairman of the Senate Intelligence Committee, also expressed concerns with these briefings, noting that "his recollection from an initial briefing in late 2001 or early 2002 was that there had been no specific discussion that the program would involve eavesdropping on American citizens."[1306]

Former Senator Democratic Leader Tom Daschle has stated that the White House "omitted key details about the surveillance programs related to the war on terrorism during classified briefings with lawmakers."[1307] He added, "[t]he presentation was quite different from what is now being reported in the press. I would argue that there were omissions of consequence."[1308] Current Majority Leader Reid (D-NV) also indicated that he received only "a single, very short briefing" and "key details about the program apparently were not provided to [him]."[1309] Also, with regard to the briefings on the NSA's domestic data base program, House Minority Leader Pelosi stated, "she hadn't been told all of the information included in the *USA Today* story. And all but a handful of lawmakers learned of the program for the first time in the news account."[1310]

d. There is little indication the domestic spying programs have been beneficial in the war against terror, while there is a significant risk the programs may be affirmatively harming terrorism prosecutions and tying up law enforcement resources

> *"[The leads provided by the NSA wiretapping program] were 'viewed as unproductive, prompting agents to joke that a new bunch of tips meant more calls to Pizza Hut'"*
>
> **-----January 17, 2006, Statement of FBI Field Supervisor to The New York Times**[1311]

We have found little, if any evidence, that the domestic spying programs have led to significant leads in the war against terror, and there is a very real risk that the existence of the programs may jeopardize terrorism prosecutions.

In December 2005, law enforcement officials told the media that the warrantless wiretapping program had not led to the detention of any al Qaeda agents in the U.S. Law enforcement sources informed that *Washington Times* that, "more than four years of surveillance by the National Security Agency has failed to capture any high-level al Qaeda operative in the United States. They said al Qaeda insurgents have long stopped using the phones and even computers to relay messages. Instead, they employ couriers. 'They have been way ahead of us in communications security,' a law enforcement source said. 'At most, we have caught some riff-raff. But the heavies remain free and we believe some of them are in the United States.'"[1312] According to *The New York Times*, "[t]he law enforcement and counterterrorism officials said the program had uncovered no active Qaeda networks inside the United States planning attacks. 'There were no imminent plots - not inside the United States,' the former F.B.I. official said."[1313] On February 2, 2006, FBI Director Mueller testified that the warrantless surveillance program had not identified a single Al Qaeda representative in the United States since the September 11 attacks.[1314] *The Washington Post* also confirmed in February, that **"[i]ntelligence officers who eavesdropped on thousands of Americans in overseas calls under authority from President Bush have dismissed nearly all of them as potential suspects after hearing nothing pertinent to a terrorist threat, according to accounts from current and former government officials and private-sector sources with knowledge of the technologies in use."**[1315] A former senior prosecutor stated that "[t]he information was so thin, and the connections were so remote, that they never led to anything, and I never heard any follow-up."[1316]

FBI officials have indicated scepticism regarding the importance of the streams of NSA intelligence and complained that they were overloaded with tips gathered from the NSA electronic surveillance. One official source acknowledged, **"[i]t affected the FBI in the sense that they had to devote so many resources to tracking every single one of these leads, and, in my experience, they were all dry leads," and that the program "led to dead ends or innocent Americans."**[1317] In response to complaints by the FBI, the NSA "began ranking its tips on a three-point scale, with three being the highest priority and one the lowest."[1318] Even after the NSA began using this ranking system, according to an official that supervised FBI field agents, the leads continued to be "viewed as unproductive, prompting agents to joke that a new bunch of tips meant more calls to Pizza Hut."[1319]

Because of legal and constitutional concerns with the domestic wiretap program, there is a risk that it will undermine pending and completed terrorism prosecutions. As First Amendment attorney Martin Garbus predicted, every defendant in a terrorism case will use the existence of the program to challenge evidence being used against them.[1320] Terror prosecutions in Florida, Ohio, Oregon and Virginia have already been challenged by defense attorneys arguing that illegal wiretaps were used to obtain valid warrants, undercutting the legality of all the evidence used against their clients.[1321] The attorneys have also filed pleadings asserting that they should have had access to the materials under normal discovery rules so they are able to

provide a full defense for their clients.[1322] At the Senate Judiciary hearings in February, FISA judges testified that "the program could imperil criminal prosecutions that grew out of the wiretaps."[1323]

Numerous additional terrorism cases involving FISA warrants may also have been threatened, even though, as noted above, the FISA court laid down strict requirements to insure that the information obtained pursuant to warrantless surveillance does not taint subsequent warrants or criminal prosecutions.[1324] According to two sources, at least twice in the last four years, James A. Baker, the counsel for intelligence policy in the Justice Department's Office of Intelligence Policy and Review, was forced to disclose to the FISA court that such information may have been wrongfully used to obtain FISA warrants.[1325]

There is also little evidence the NSA's domestic data base program has aided in the apprehension of terrorists. For example, on May 22, 2006, *Newsweek* reported that "administration officials [they] interviewed ... questioned whether the fruits of the NSA [database] program - which they doubted, though not publicly at the risk of losing their jobs - have been worth the cost to privacy."[1326] One Pentagon consultant admitted, "[t]he vast majority of what we did with the [NSA] intelligence was ill-focused and not productive. It's intelligence in real time, but you have to know where you're looking and what you're after."[1327] When Senate Majority Leader Bill Frist (R-TN) was interviewed by Wolf Blitzer on May 14, 2006, Mr. Frist , while defending the program's lawfulness, refused to identify or even knowledge any specific successes against terrorism, even though he was asked three separate times whether "there has been one success story that you can point to."[1328]

e. The NSA programs appear to have been implemented in a manner designed to stifle objections and dissent within the Administration

> *"Miffed that [Deputy Attorney General James] Comey, a straitlaced, by-the-book former US attorney from New York, was not a 'team player' on this and other issues, President George W. Bush dubbed him with a derisive nickname, 'Cuomo,' who vacillated over running for president in the 1980's."*
>
> **-----Feb. 6, 2006, Statement of government source to *Newsweek*[1329]**

Defenders of the Administration have contended that even if the warrantless surveillance programs are unlawful, the Administration engaged in the programs in good faith.[1330] However, it is difficult to confirm such a claim when the Administration refuses to turn over the secret legal opinions and related material involved in the NSA programs initial approval,[1331] and will not even disclose the names of those individuals involved in the initial authorization of the programs.[1332]

At the same time, the public record appears to show that the warrantless wiretapping programs were created in a manner specifically designed to facilitate its approval. Thus, officials within the Bush Administration told *Time* that when the

warrantless wiretapping program was created, "the 'lawyers group,' an organization of fewer than half a dozen government attorneys the National Security Council convenes to review top-secret intelligence programs, was bypassed. Instead, the legal vetting was given to Alberto Gonzales, then the White House counsel."[1333] Similarly, *Newsweek* reported, "[t]he eavesdropping program was very closely held, with cryptic briefings for only a few congressional leaders ... .. [then counsel to the Vice President David] Addington and his allies made sure the possible dissenters were cut out of the loop."[1334] Among others, the Vice President himself "played a direct role in the controversial surveillance program."[1335] Incredibly, then Deputy Attorney General Larry Thompson, who had been involved in nearly all of the Administration's classified counterterrorism activities, was not involved or otherwise given access to the program.[1336]

We have also identified a pattern by which senior members of the Bush Administration appear to have sought retaliation against those individuals who have expressed concerns regarding the warrantless wiretapping program. The most notable example of this retribution comes in the form of the Justice Department's "leak" investigation into the whisteblowing activity that led to the disclosure of the NSA program.[1337] This was specifically referred to by President Bush who claimed it was "a shameful act for someone to disclose this very important program in a time of war. The fact that we're discussing the program is helping the enemy."[1338] In an apparent effort to make sure there was no doubt that the "aggressive and fast moving"[1339] legal reaction by the Bush Administration was noted, the Department of Justice took the highly unusual step of publicly announcing that it had commenced an investigation on December 30, 2005.[1340]

Of course, when asked what possible fallout could come from disclosing the rather unexceptional fact that terrorists might be subject to surveillance, the only argument the Administration could muster was that it somehow "reminded" the terrorists to be careful.[1341] As George Will noted, "surely America's enemies have assumed that our technologically sophisticated nation has been trying, in ways known and unknown, to eavesdrop on them."[1342] Frank Rich also pointed out that "[a]lmost two weeks before *The New York Times* published its scoop about our government's extralegal wiretapping, the cable network Showtime blew the whole top-secret shebang. In its mini-series "Sleeper Cell," about Islamic fundamentalist terrorists in Los Angeles, the cell's ringleader berates an underling for chatting about an impending operation during a phone conversation with an uncle in Egypt. 'We can only pray that the N.S.A. is not listing,' the leader yells at the miscreant, who is then stoned for blabbing."[1343]

The few attorneys at Justice willing to voice legal concerns regarding the wiretapping program also faced severe criticism and threats from high ranking officials within the Administration, according to current and former DOJ officials.[1344] This led to Deputy Attorney General James Comey to state in his farewell speech at DOJ, "the people committed to getting it right - and to doing the right thing ... know who they are. Some of them did pay a price for their commitment to right."[1345]

These individuals included former Assistant Attorney General in charge of the Office of Legal Counsel, Jack Goldsmith and Patrick Philbin, a national security aide to the Deputy Attorney General, both of whom raised questions regarding the NSA program.[1346] According to sources, although Philbin "had been the in-house favorite to become deputy solicitor general . . . his chances of securing any administration job [were] derailed when [David] Addington who had come to see him as a turncoat on national-security issues, moved to block him from promotion, with Cheney's blessing."[1347] ***Newsweek* further reported that within the Justice Department those who raised questions regarding the program "did so at their peril; [they were] ostracized ... denied promotions, while others left . . . .** Some went so far as to line up private lawyers in 2004, anticipating that the president's eavesdropping program would draw scrutiny from Congress, if not prosecutors."[1348]

When Mr. Comey himself registered concerns with the NSA wiretapping program, which led to a secret audit of the program, the displeasure went all the way up to the President. The *New York Post* reported that as a result of this disloyalty, President Bush began referring to Mr. Comey as "Cuomo," after former New York Democratic Governor Mario Cuomo who was considered not to be a "team player."[1349] *Newsweek* also confirmed that "[m]iffed that Comey, a straitlaced, by-the-book former US attorney from New York, was not a "team player" on this and other issues, President George W. Bush dubbed him with a derisive nickname, '"Cuomo,' who vacillated over running for president in the 1980's."[1350]

With respect to the domestic data base program, there is also evidence that it was set up in a manner designed to eliminate dissent and avoid scrutiny by attorneys at the Justice Department. Intelligence historian Matthew Aid explained, "it does seem clear that the Justice Department was excluded from all of this, or at least the parts of the Justice Department that would normally have some oversight over this... .They kept the number of people within the Justice Department who had knowledge of the program to a small number of people. I think they feared that if they passed it down to other departments that might have some purview over the program they might have encountered a stream of objections."[1351]

There are also reports the Bush Administration applied inappropriate pressure on Qwest in an effort to force them to participate in the NSA database program. *USA Today* reported that according its sources, after Qwest refused to voluntarily participate, **"the agency suggested that Qwest's foot-dragging might affect its ability to get future classified work with the government.** Like other big telecommunications companies, Qwest already had classified contracts and hoped to get more."[1352]

2. Continued Stonewalling of Congress and the American People

"When the President does it, that means it's not illegal."

-----May 20, 1977, President Richard Nixon explaining his interpretation of executive privilege in an interview with David Frost.[1353]

As we learned when reviewing the deceptions and manipulations associated with the Downing Street Minutes and the War in Iraq, the Bush Administration has shut down any semblance of independent review or meaningful oversight associated with the domestic spying scandal. As Senate Judiciary Chairman Specter observed, "[t]hey want to do just as they please, for as long as they can get away with it. I think what is going on now without congressional intervention or judicial intervention is just plain wrong."[1354]

First, the Administration spurned attempts to have an independent special counsel review the legality of the NSA programs, even though such a review would clearly meet the criteria set forth in the regulations.[1355] When Rep. Zoe Lofgren (D-CA) and 17 other Members requested a special counsel regarding the warrantless wiretapping program, the White House Press Secretary, stated that there was not any basis for appointing a special counsel and that Members "ought to spend their time on what was the source of the unauthorized disclosure of this vital and critical program."[1356] After *USA Today* revealed the existence of a massive NSA data base program, Rep. Lofgren and 53 other Members of Congress extended the request to include all of the domestic surveillance programs.[1357] There has been no response to this letter. Rep. Conyers asked the Attorney General about the Department's record of having failed to appoint a single special counsel during the entire Bush Administration, Mr. Gonzales appeared to not even appreciate that he had the authority to appoint a special counsel pursuant to DOJ regulations.[1358]

Democrats have also been rebuffed in their efforts to obtain an independent review outside of the special counsel regulations, with both the Department of Justice Inspector General[1359] and the Department of Defense Inspector General[1360] claiming they did not have jurisdiction to consider the matters. Although in February 2006, the DOJ Office of Professional Responsibility (OPR) did initially agree to investigate whether Department attorneys had violated any ethical rules in approving the warrantless wiretap program,[1361] by May, the Bush Administration had squashed this investigation as well by denying OPR attorneys security clearances needed to review DOJ's role in the program.[1362] Requests by the House Democratic Leadership to conduct hearings and create an independent panel to examine the programs have also been ignored by the Republican Leadership,[1363] as have been efforts by Sen. Byrd in the Senate and Rep. Conyers in the House to have a blue ribbon commission review the programs.[1364]

Second, the Senate and House Judiciary Committees were unsuccessful in obtaining meaningful information from the Bush Administration regarding the domestic spying scandal. At the Senate hearings, in a break with regular order, the Attorney General was not even sworn in.[1365] At the hearings, Members became so exasperated by Mr. Gonzales' failure to respond to their questions that Ranking Member Leahy was forced to state, "[o]f course, I'm sorry, Mr. Attorney General, I

forgot; you can't answer questions that might be relevant to this."[1366] After initially raising no objection to the Committee's request that former Attorney General Ashcroft or former Deputy Attorney General Comey testify - both of whom had first-hand knowledge regarding the legal foundations for the warrantless wiretapping program - the Department of Justice subsequently blocked them from testifying.[1367] The Bush Administration also killed an effort by Senate Judiciary Chairman Arlen Specter to ask telephone executives to testify regarding the NSA's domestic database program.[1368]

The Department also failed to respond to the vast majority of the written questions submitted by both Democrats and Republicans on the House Judiciary Committee in advance of general oversight hearings.[1369] This failure caused Chairman Sensenbrenner to accuse the Department of "stonewalling": "I think that saying that how the review was done and who did the review is classified is stonewalling. And if we're properly to determine whether or not the program was legal and funded - because that's Congress's responsibility - we need to have answers, and we're not getting them."[1370]

The GOP-controlled Senate and House Intelligence Committees also have failed to fulfill their oversight responsibilities. The Senate Intelligence Committee initially appeared to be considering a meaningful investigation of the NSA wiretapping program, however, after intense White House lobbying, the Committee voted against such an investigation on a party-line basis.[1371] **After the Committee vote, Ranking Democrat John Rockefeller (D-WI) declared, "[t]he committee is, to put it bluntly, basically under the control of the White House."**[1372] *The New York Times* wrote, "[t]he [NSA] program violates the law. Congress knows it. The public knows it. Even President Bush knows it. (He just says the law doesn't apply to him.) In response, the Capitol Hill rebels are boldly refusing to investigate the program - or any other warrantless spying that is going on. . . .And meanwhile, they've created new subcommittees to help the president go on defying the law."[1373]

In addition, Senate Republicans introduced two bills, one by Senator DeWine, and another by Senator Specter, both of which would effectively ratify the practice of warrantless surveillance of innocent Americans. The DeWine legislation would "entirely remove intelligence gathering related to terrorism from the [FISA] law;"[1374] while the Specter legislation would "grant legal cover, retroactively, to the one spying program Mr. Bush has acknowledged. It also covers any other illegal wiretapping we don't know about - including, it appears, entire programs that could cover hundreds, thousands, or millions of unknowing people."[1375] Rather than investigate the domestic spying program, the Chairman of the Senate Intelligence Committee has proposed new legislation to broaden the coverage of leaks, cracking down on the very whistleblowers who have helped disclose the illegal NSA program.[1376]

The Republican Leadership has also blocked legislative efforts to obtain further information about the NSA spying programs. Representatives Lee,[1377] Conyers,[1378]

Slaughter,[1379] and Wexler,[1380] have all introduced separate Resolutions of Inquiry to direct the Administration to provide documents concerning the authorization of the warrantless wiretapping program.[1381] The rejection of these resolutions by the Majority has prevented Congress from obtaining copies of the original legal opinions issued concerning the domestic surveillance programs.[1382] At the same time, on May 22, the GOP-dominated FCC also rejected a request by Rep. Markey (D-MA) that they investigate the legality of the NSA database program.[1383]

The Bush Administration has compounded the oversight difficulties through misstating facts and their proclivity toward secrecy. For example, while the Bush Administration argues it has convicted hundreds upon hundreds of individuals in terrorism cases, a careful review reveals that the vast majority of these cases bear no relation to terrorism. Thus, in June 2005, *The Washington Post* reported that only 39 people - not the 200 implied by President Bush - have been convicted of terrorism-related crimes since the September 11 attacks.[1384] Another independent review of cases brought in 2003 by the *Miami Herald*, found that the Justice Department claimed to have charged 56 people as "terrorists," however, 41 of these cases were found to have had nothing to do with terrorism.[1385] The *Daily Iowan* also reported that where numerous individuals who the Administration claimed convicted of terrorism were found to have actually been implicated in far more minor offenses.[1386] A GAO Report found that in 2002, "at least 132 of the 288 convictions ... were misclassified as terrorism-related."[1387]

By making numerous changes to narrow FOIA, expanding the classification rules, and repeatedly asserting the state secrets doctrine, the Bush Administration has also unilaterally acted to make it far more difficult for Congress, the media, and the American people to have access to government documents concerning these abuses. (The notable exception to these sweeping increases in secrecy is in cases where members of the Bush Administration have chosen to selectively declassify documents for political purposes.[1388])

First, the Bush Administration significantly narrowed the scope of the FOIA by providing that agencies are entitled to the government's full legal support for withholding information from the public.[1389] The GAO found that this led federal agencies to significantly inhibit the release of previously public information.[1390] Second, the Administration dramatically expanded the use of the "state secret doctrine" to block access to government documents.[1391] Among other things, the doctrine was used by the Administration to block Sibel Edmonds, a FBI translator, from seeking redress as an intelligence whistleblower,[1392] to limit information concerning the case of Maher Arar, a Canadian citizen sent to Syria where he was tortured,[1393] to seek dismissal of suits challenging the NSA's wiretapping program brought against AT&T,[1394] two suits challenging the legality of the NSA's warrantless wiretap program brought by the ACLU and the Center for Constitutional Rights,[1395] 20 lawsuits brought against telephone companies alledging that they had improperly provided customer call data to the NSA[1396], and a lawsuit alleging that the CIA had wrongfully imprisoned a German citizen.[1397] Third, President Bush has eliminated the

presumption of disclosure when the federal government makes classification decisions,[1398] resulting in a significant increase in the number of documents classified each year. [1399]

President Bush has also used presidential signing statements in an effort to negate laws providing for congressional oversight. This includes statements that he can ignore statutes requiring reports on the use of national security wiretaps against American citizens; disclosure of memorandums setting forth new interpretations of domestic spying laws; reports on civil liberties, security clearance and border security; reports on possible vulnerabilities in chemical plants and baggage screening at airports; and notification regarding diversions of funds for secret "black sites"[1400] Concerning this practice, NYU Law Professor David Golove has warned, a "President who ignores the court, backed by a Congress that is unwilling to challenge him can make the Constitution simply disappear."[1401]